

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)	
)	
Modification and Amendment of)	Docket No. 18-CRB-0012-RM
Regulations to Conform to the MMA)	
)	

JOINT COMMENTS OF THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION
AND DIGITAL MEDIA ASSOCIATION

The National Music Publishers' Association ("NMPA") and Digital Media Association ("DiMA") submit these comments in response to the Copyright Royalty Judges' ("CRJs") Notification of Inquiry ("NOI") seeking comment on necessary and appropriate modifications and amendments to agency regulations following enactment of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act ("MMA").¹ Among other changes, the MMA amends Section 115 of the Copyright Act to create a new blanket license for digital uses of musical works and a new centralized entity, the mechanical licensing collective ("MLC"), to administer the new license.

NMPA, DiMA and their respective members have a significant interest in any regulations to be adopted under the MMA.

Since its founding in 1917, the NMPA has been the principal U.S. trade association representing the interests of copyright owners of musical works, including music publishers and songwriters. Taken together, compositions owned or controlled by NMPA members account for the vast majority of the market for musical composition licensing in the United States. The

¹ Pub. L. No. 115-264, 132 Stat. 3676 (Oct. 11, 2018); *see also* *Modification and Amendment of Regulations to Conform to the MMA*, 83 Fed. Reg. 55,334 (Nov. 5, 2018) ("NOI").

NMPA has also long represented the interests of music copyright owners in proceedings before the CRJs (and their predecessor tribunals) to set royalty rates and terms under the Section 115 mechanical compulsory license of the Copyright Act, as well as before the U.S. Copyright Office to establish rules for the administration of the Section 115 license. Given the vital interest of its members in a well-functioning mechanical licensing system, the NMPA played a primary role in developing and articulating the blanket licensing system enacted in the MMA, including the requirements and functions of the MLC.

DiMA is the leading national trade organization dedicated to representing the interests of licensed digital media services, including many of the leading digital music providers (as defined in the MMA) in the marketplace today. DiMA's members, including Amazon.com, Apple, Google/YouTube, Pandora, and Spotify,² represent the vast majority of covered activity (as defined in the MMA) taking place in the United States today. Like NMPA, DiMA represents its members in royalty ratesetting proceedings before the CRJs under Section 115 and has been actively involved in many of the recent studies, analyses, public inquiries and roundtables conducted by the Copyright Office on various aspects of music law, as well as the formulation of the blanket licensing framework enacted in the MMA.

As reflected in the NOI, the MMA establishes a new, streamlined procedure before the CRJs to establish an administrative assessment to be paid by digital music providers and significant nonblanket licensees in order to fund the MLC. Under the statute, administrative assessment proceedings, which are wholly separate from royalty ratesetting proceedings, are to be conducted under simplified, abbreviated procedures.³ Indeed, as the CRJs point out, the

² A complete list of DiMA's membership may be found at <http://www.digmedia.org>.

³ See 17 U.S.C. §§ 801(b)(8), 115(d)(7)(D)(iii)-(iv).

MMA expressly provides that the procedures set forth in Section 115(d) are to apply to administrative assessment proceedings, rather than the more complex procedures for royalty ratesetting and distribution proceedings set forth in Sections 801, 803, 804 and 805.⁴ Accordingly, the CRJs should establish new procedures and practices to govern administrative assessment proceedings that conform to the framework set forth in the MMA. To that end, in these comments and Appendix A hereto, NMPA and DiMA propose rules to govern administrative assessment proceedings that track the requirements of the MMA. In keeping with the MMA, the proposed procedures are designed for efficient and fair establishment of the appropriate administrative assessment amount within the limited time frame set forth in the MMA,⁵ while also avoiding unwarranted costs for the parties or undue administrative burden on the CRJs.

In addition to adopting appropriate procedures to establish the administrative assessment, as the CRJs observe, the MMA also requires consideration and adjustment of existing definitions in Part 385 of 37 CFR⁶ to conform existing regulatory definitions to the definitions in Section 115(e).⁷ In Appendix B, NMPA and DiMA set forth proposed amended definitions for the affected sections of part 385, as well as other changes required for conformity with the MMA.

NMPA and DiMA appreciate the opportunity to respond to the NOI, including the specific questions posed therein, and hope that the CRJs will find these comments helpful.

⁴ To the extent applicable, the provisions of Section 802 remain in effect. *See id.* § 801(b)(8).

⁵ *See id.* § 115(d)(7)(D)(iii)(IV); *id.* § 115(d)(7)(D)(iv)(III).

⁶ The CRJs recently adopted new regulations to implement their Final Determination in *In re Determination of Royalty Rates and Terms for Making and Distributing Phonorecords*, No. 16-CRB-0003-PR (2018-2022) (“Phonorecords III Determination”), to be codified at 37 C.F.R. part 385.

⁷ *See* MMA tit. I, § 102(d); 37 C.F.R. pt. 385.

I. ADMINISTRATIVE ASSESSMENT PROCEEDINGS ARE SIMPLIFIED PROCEEDINGS GOVERNED BY MMA SECTION 115(d), NOT EXISTING PROCEDURES FOR ROYALTY RATESETTING AND DISTRIBUTION PROCEEDINGS.

The NOI seeks comment on the effect of MMA Section 801(b)(8) on the CRJs' authority under existing Sections 801, 803, 804, and 805 of the Copyright Act. Specifically, in related questions, the NOI asks:

(3) What effect, if any, does the new language in subparagraph 8 of section 801(b) have on the Judges' ability to make necessary procedural or evidentiary rulings under sections 801, 803, 804, and/or 805 of the Copyright Act, and, in particular, does the new language have the effect that the Judges are now required to adopt new regulations, notwithstanding their general authority under section 801(c)?

(4) If the new language in subparagraph 8 of section 801(b) affects the Judges' authority under other subsections of section 801, how does it change that authority or the procedures to exercise that authority?⁸

The MMA mandates that administrative assessment proceedings are to be conducted under the provisions of Section 115(d) and are not subject to the procedures set forth in Sections 801, 803, 804, or 805. More specifically, the new language of Section 801(b)(8) provides that, except to the extent Section 802 may apply,⁹ the procedures that govern royalty ratesetting and other types of proceedings under Section 801 *et seq.* of the Copyright Act ***do not apply*** to the new administrative assessment proceedings:

⁸ NOI at 55,335.

⁹ Section 802, *inter alia*, permits the CRJs or, by motion to the CRJs, any participant in a proceeding to request from the Register of Copyrights an interpretation of any "material questions of substantive law" arising in CRJ proceedings and to "review for legal error the resolution by the Copyright Royalty Judges of a material question of substantive law under this title that underlies or is contained in a final determination of the Copyright Royalty Judges." 17 U.S.C. § 802(f)(1).

.... (8) To determine the administrative assessment to be paid by digital music providers under section 115(d). The provisions of section 115(d) shall apply to the conduct of proceedings by the Copyright Royalty Judges under section 115(d) ***and not the procedures described in this section [801], or section 803, 804, or 805.***¹⁰

In response to questions (3) and (4) of the NOI, then, the administrative assessment is to be determined under the streamlined process outlined in Section 115(d), and not under the more complex procedures that govern royalty ratesetting proceedings under Section 801 *et seq.*

The clear statutory mandate limiting the administrative assessment proceeding to the process outlined in Section 115(d), subject only to possible application of Section 802, is also unambiguously reflected in the legislative history of the MMA. Both the Senate Report and the House Report accompanying the MMA expressly provide that Section 801(b)(8) was included to clarify that the administrative assessment will “be determined under the provisions created by this legislation, ***rather than the procedures of existing law.***”¹¹

At the same time, the existing procedures provided in Sections 801, 803, 804, and 805 still apply to the other types of CRJ proceedings described in Section 801(b)(1)-(7).¹² The new

¹⁰ *Id.* § 801(b)(8) (emphasis added).

¹¹ S. REP. NO. 115-339, at 26 (2018) (emphasis added); H.R. REP. NO. 115-651, at 29 (2018) (emphasis added). Even without this legislative history, as a matter of statutory construction, the later and highly specific language of the MMA carving the administrative assessment proceedings out from the more general existing provisions must be understood to override the more general provisions. *See Morton v. Mancari*, 417 U.S. 535, 550–51 (1974) (“Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.” (citations omitted)); *see also, e.g., Law v. Siegel*, 571 U.S. 415, 421 (2014) (applying “the axiom that a statute’s general permission to take actions of a certain type must yield to a specific prohibition found elsewhere” (citations omitted)).

¹² More specifically, the new language in paragraph (8), which adds the determination of the administrative assessment to the list of functions of the CRJs, specifies that the procedures set forth in Section 115(d) shall apply to the conduct of proceedings under that section in lieu of the otherwise applicable procedures set forth in Sections 801, 803, 804 and 805. The determination of the administrative assessment is the only type of proceeding governed by Section 115(d). Therefore, with respect to proceedings before the CRJs other than proceedings to determine the administrative assessment, such as royalty ratesetting and distribution proceedings, the new language in Section

language in Section 801(b)(8) has no effect on the applicability of these procedures to CRJ proceedings apart from the administrative assessment proceeding.¹³

In question (3), the CRJs seek specific comment on whether and how the new language in Section 801(b)(8) affects their ability to make “necessary procedural or evidentiary rulings under sections 801, 803, 804, and/or 805 of the Copyright Act” in the context of an administrative assessment proceeding.¹⁴ The focus of this question is Section 801(c), which provides that the CRJs “may make any necessary procedural or evidentiary rulings in any proceeding under this chapter [8] and may, before commencing a proceeding under this chapter, make any such rulings that would apply to the proceedings”¹⁵ By its terms, this provision applies to proceedings “under” chapter 8 that are “commenced” under chapter 8, while administrative assessment proceedings are commenced and conducted under chapter 1. Thus, while Section 801(c) provides the CRJs with authority to make procedural and evidentiary rulings in proceedings commenced and conducted under Section 801 *et seq.*, that authority does not extend to the administrative assessment proceedings.¹⁶

801(b)(8) does not affect the CRJs’ “authority or the procedures to exercise that authority,” including their ability to make necessary procedural or evidentiary rulings in such proceedings. NOI at 55,335.

¹³ Under the MMA, however, determinations of rates and terms for digital phonorecord deliveries in such proceedings shall no longer be calculated to achieve the objectives previously listed in Section 801(b), which objectives have been deleted from Section 801(b). See 17 U.S.C. § 115(c)(1)(F); MMA tit. I, § 103(g)(2). Instead, the CRJs in such proceedings are to “establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.” 17 U.S.C. § 115(c)(1)(F).

¹⁴ NOI at 55,335.

¹⁵ 17 U.S.C. § 801(c).

¹⁶ Even if one were to reach the opposite conclusion—that the CRJs’ authority under Section 801(c) to render procedural and evidentiary rulings extends to administrative assessment proceedings conducted by the CRJs under Section 115(d)—the result is the same: whether looking to Section 801(c) or Section 115(d), the CRJs are able to exercise such authority.

But this does not mean that the CRJs lack the authority to make procedural or evidentiary rulings in the context of administrative assessment proceedings. Rather, the CRJs are afforded broad authority under the MMA to establish rules “to govern the conduct of proceedings under [Section 115(d)(7)]” to set the administrative assessment.¹⁷ Any such regulations can and should include rules to govern decisions on procedural and evidentiary matters.¹⁸

Question (3) also seeks comment on whether the new language in Section 801(b)(8) has “the effect that the Judges are now required to adopt new regulations.”¹⁹ NMPA and DiMA submit that the answer is yes; in addition to adding new procedures to govern the unique administrative assessment proceedings, certain changes to Part 350 *et seq.* of 37 CFR should be made to clarify that various procedures set forth therein do *not* apply to such proceedings, as further discussed below.

With respect to question (4), again, for the reasons discussed above, while the new language in Section 801(b)(8) does not alter the CRJs’ existing procedural authority in other contexts, such as in royalty ratesetting and distribution proceedings, it does instruct that the CRJs are to rely on the alternative authority provided under Section 115(d) with respect to the new administrative assessment proceeding. Moreover, the MMA is clear that any procedures set forth in Section 801, 803, 804 and 805 do not apply to the more abbreviated administrative assessment proceedings.

Both the plain language of the MMA and the congressional intent behind that language, as underscored by the MMA’s legislative history, make clear that administrative assessment

¹⁷ 17 U.S.C. § 115(d)(7)(D)(viii).

¹⁸ *See* App. A § 355.1(c).

¹⁹ NOI at 55,335.

proceedings are governed by the *sui generis* procedures set forth in the statute, and not the procedures applicable to other CRJ proceedings. As further explained below, new regulations can and should be adopted to guide these more limited and streamlined proceedings.

II. THE CRJS ARE REQUIRED TO UPDATE CERTAIN SECTION 115 RATESETTING DEFINITIONS TO CONFORM TO THE MMA.

In the NOI, the CRJs “solicit proposed new or modified regulatory language that may be necessary to fully implement the MMA.”²⁰ Question (1) of the NOI is addressed to regulations that *must* be amended as a result of the enactment of the MMA:

*(1) What regulations in chapter III, title 37 CFR, if any, must be changed and how?*²¹

Under Section 102(d) of the MMA, the CRJs are required “to conform the definitions used in [part 385 of title 37 of the CFR] to the definitions” set forth in the MMA.²² The provision further provides that adjustments shall be made to affected CFR provisions as necessary to achieve “the same purpose and effect as the original regulations with respect to the rates and terms previously adopted” by the CRJs.²³ In reviewing the definitions established in the most recent Section 115 ratesetting proceeding,²⁴ it is clear that certain conforming amendments are necessary to harmonize the CFR definitions to the ones provided in the MMA. Accordingly, NMPA and DiMA suggest a number of modifications to the recently adopted CFR

²⁰ *Id.*

²¹ *Id.*

²² See MMA tit. I, § 102(d) (providing that “the Copyright Royalty Judges *shall* amend the regulations for section 115” codified in 37 C.F.R. pt. 385 (emphasis added)).

²³ *Id.*

²⁴ See Phonorecords III Determination at Attachment A.

definitions. Appendix B sets forth a redline of the proposed revisions to the CFR definitions (“Proposed Definitions”) as compared against the existing CFR definitions.

The changes in the Proposed Definitions are limited and narrowly tailored to fulfill the MMA’s mandate. As they reflect, in a few cases where a definition set forth in the MMA simply employs different terminology for the same concept, the Proposed Definitions replace the CFR terminology with the MMA terminology. For example, the MMA term “Permanent Download” and related definition are substituted for the term “Permanent Digital Download” and definition. By contrast, where an MMA term is conceptually similar or employs similar terminology as, but is not fully congruent with, the CFR term—and could thus cause confusion or potentially impact the application of the ratesetting regulations—the Proposed Definitions adopt separate nomenclature so that the distinction is maintained. For example, because the definition of “Limited Download” differs as between the MMA and the CFR, the Proposed Definitions substitute the term “Eligible Limited Download” for “Limited Download” in the CFR provisions. Similarly, the Proposed Definitions change the term “Record Company” in the regulations to “Sound Recording Company”; this is because the CFR definition, while in some ways similar to the MMA definition, nonetheless substantively departs from the MMA definition.

The definitional changes reflected in Appendix B are limited and technical in nature, but are required under the MMA. The amendments will serve to eliminate ambiguity and confusion.²⁵

²⁵ In reviewing Part 385, NMPA and DiMA noted certain typographical errors in the text of the regulations. As these Joint Comments respond to specific questions posed by the CRJs in relation to the MMA, Appendix B does not address these additional textual concerns.

III. THE CRJS CAN AND SHOULD ADOPT SPECIFIC REGULATIONS NOW TO GOVERN ADMINISTRATIVE ASSESSMENT PROCEEDINGS AND MAY LATER NEED TO REVISE CERTAIN EXISTING REGULATIONS TO CONFORM THEM TO FUTURE REGULATIONS REQUIRED TO BE ADOPTED BY THE REGISTER OF COPYRIGHTS.

Question (2) of the NOI asks about regulations that *should* be changed as a result of the MMA:

*(2) What regulations in chapter III, title 37 CFR, if any, should be changed and how?*²⁶

The CRJs can and should adopt new regulations to govern the unique administrative assessment proceedings.

A. The CRJs Should Adopt Regulations to Govern the Administrative Assessment Proceedings.

The MMA is explicit that the administrative assessment for digital services is to be determined in a wholly separate proceeding governed by MMA Section 115(d), and that the procedures prescribed for royalty ratesetting and distribution proceedings under existing Sections 801, 803, 804 and 805 before the CRJs do not apply to administrative assessment proceedings.²⁷ Congress envisioned a simplified, less cumbersome proceeding to establish the administrative assessment. This is sound policy. Unlike a royalty ratesetting or distribution proceeding, the administrative assessment proceeding turns on a discrete and limited universe of information—essentially, information concerning the reasonable collective total costs of the MLC. Under the MMA framework, as compared to a royalty ratesetting or distribution proceeding, administrative

²⁶ NOI at 55,335.

²⁷ See 17 U.S.C. § 801(b)(8).

assessment proceedings can occur more frequently and must conclude more quickly—within a year of commencement.²⁸

The MMA includes provisions setting forth the procedures to commence a proceeding²⁹ and the criteria for determining the administrative assessment.³⁰ It requires the CRJs to establish (1) “a schedule for submission by the parties of information that may be relevant to establishing the administrative assessment, including actual and anticipated collective total costs of the mechanical licensing collective, actual and anticipated collections from digital music providers and significant nonblanket licensees, and documentation of voluntary contributions”; and (2) “a schedule for further proceedings, which shall include a hearing, as the Copyright Royalty Judges determine appropriate.”³¹

Because the existing procedures for royalty ratesetting and distribution proceedings do not apply to administrative assessment proceedings, the CRJs should exercise their authority to adopt specific procedures more suitable to the limited administrative assessment proceedings Congress envisioned under the MMA. Such regulations would serve to facilitate a predictable and organized process for the benefit of the participants and CRJs alike. As such, NMPA and DiMA propose a set of procedures to effectuate the simpler administrative assessment proceedings, modeled in some respects on summary judgement proceedings and adapting certain aspects of the CRJs’ procedures in other types of proceedings, albeit in a more compressed form.

²⁸ See *id.* § 115(d)(7)(D)(iii)(IV); *id.* § 115(d)(7)(D)(iv)(III). By contrast, determinations in other CRJ proceedings need not be made until 11 months after the conclusion of the post-discovery settlement conference or 15 days before the expiration of the existing rates or terms in a proceeding to determine successors to rates or terms that will expire on a specific date, whichever occurs first. See *id.* § 803(c)(1); see also 37 C.F.R. § 352.2.

²⁹ 17 U.S.C. § 115(d)(7)(D)(iii)–(iv).

³⁰ *Id.* § 115(d)(7)(D)(ii).

³¹ *Id.* § 115(d)(7)(D)(iii)(III).

Specifically, as reflected in Appendix A hereto, the NMPA and DiMA propose to add a new Part 355 to Title 37, Chapter III, Subchapter B of the CFR (“Proposed Procedures”). The Proposed Procedures would apply solely to the administrative assessment proceedings under Section 115(d). Although, as discussed above, these proceedings are to be separate from and simpler than other types of CRJ proceedings, a number of the Proposed Procedures are adapted from existing regulations that apply to other CRJ proceedings in Parts 351 and 352 of Title 37, Chapter III, Subchapter B of the CFR. In addition, a proposed revision to 37 C.F.R. § 350.1 in Appendix B hereto makes clear that a series of existing general administrative provisions in Part 350, including provisions relating to document formats and electronic filing via eCRB, will still apply to these administrative assessment proceedings. NMPA and DiMA hope to reduce administrative overhead and burdens on both the CRJs and the parties to the proceedings by incorporating these familiar procedures to the extent possible while maintaining fidelity to the MMA’s statutory directives. The CRJs have the authority to adopt such procedures under Section 115(d)(7)(D)(viii).

Under the Proposed Procedures, in accordance with the statutory directives of the MMA, the initial administrative assessment proceeding commences with the CRJs’ publication of a notice in the Federal Register, whereas subsequent proceedings to adjust the administrative assessment may be triggered by a petition of the MLC, the digital licensee coordinator (“DLC”), or another interested party.³² In setting forth a logical process for the filing and acceptance of petitions, the Proposed Procedures track the statutory requirements.³³

³² See *id.* § 115(d)(7)(D)(iii)(I); *id.* § 115(d)(7)(D)(iv)(I).

³³ See generally App. A.

As noted above, the MMA further directs the CRJs to set a schedule for the administrative assessment proceeding, in particular with respect to the submission of information to be submitted by the parties.³⁴ It also requires scheduling of a hearing.³⁵ The MMA does not detail specific procedures for these aspects of the proceedings, and instead vests the CRJs with the authority to “adopt regulations to govern the conduct of [such] proceedings.”³⁶ NMPA and DiMA thus propose a streamlined submission process that is designed to expedite discovery between the participating parties and therefore allow the CRJs sufficient time to make their ultimate determination of the administrative assessment. To that end, the schedule set forth in the Proposed Procedures is designed for all submissions to be complete and submitted to the CRJs and the hearing held within approximately eight months, leaving approximately four months for the CRJs to make their determination.³⁷

The submission process in the Proposed Procedures is designed to accommodate sufficient time for the parties to review and seek targeted discovery from the other parties in a manner that is sufficiently swift to have the record submitted to the CRJs with enough time to make their determination. To that end, the MLC’s submission deadlines overlap with the voluntary negotiation periods, during which the MLC and DLC can reach a voluntary agreement for adoption by the CRJs in lieu of a litigated determination of the administrative assessment.³⁸

The MLC files the first submission, followed by responsive submissions from the DLC and other

³⁴ 17 U.S.C. § 115(d)(7)(D)(iii)(III).

³⁵ *Id.*

³⁶ *Id.* § 115(d)(7)(D)(viii).

³⁷ App. A § 355.2(h). The Proposed Procedures also grant the CRJs express authority to modify the schedule—subject to the one-year statutory deadline to complete the determination of the administrative assessment—to provide further flexibility to both the CRJs and the parties to the proceedings. *Id.* § 355.2(h)(2).

³⁸ *Id.* § 355.4; *see* 17 U.S.C. § 115(d)(7)(D)(v).

participating parties, followed by a discretionary reply submission by the MLC.³⁹ The Proposed Procedures also specify the content of these submissions in a manner consistent with the statutory directives of the MMA.⁴⁰ Specifically, submissions must consist of a written statement supporting (or disputing) the proposed administrative assessment to fund reasonable collective total costs, as well as analysis to support (or dispute) the proposal's compliance with MMA requirements.

Concurrently with the parties' submissions, the parties will also produce documents to each other to demonstrate actual and anticipated reasonable collective total costs, among other elements specified in the MMA. In this manner, the Proposed Procedures provide for an integrated discovery process that requires each party to produce at the outset the documents necessary to demonstrate whether the MLC's proposal as set forth in its initial submission meets the requirements set forth in the MMA, but allows parties to seek additional supporting documents from another party upon a showing that the documents are relevant and not unduly burdensome.⁴¹ The MLC and DLC are also each able to take a limited number of depositions during their respective discovery periods, with other participants able to attend and examine deponents for a portion of the allotted time.⁴² The Proposed Procedures also include a streamlined process that allows participants to request rulings from the CRJs in a manner designed to be efficient and expedient for both the participants and the CRJs.⁴³ In addition, the Proposed Procedures set forth provisions to guide the hearing, which is limited to argument

³⁹ App. A § 355.3.

⁴⁰ *Id.*; see also 17 U.S.C. §§ 115(d)(7)(D)(ii)(V), 115(d)(7)(D)(iii)(III).

⁴¹ App. A § 355.3.

⁴² *Id.* § 355.3(e).

⁴³ *Id.* § 355.3(h).

addressed to the parties’ submissions unless the CRJs determine that there is a need for examination of witnesses.⁴⁴ Last but not least, the Proposed Procedures set forth procedures and timing for the CRJs’ ultimate determination of the administrative assessment, consistent with the statutory requirements of the MMA.⁴⁵

B. The CRJs May Need to Adjust Other Regulations as the Register of Copyrights Adopts Regulations That Are Required Due to the Enactment of the MMA

Finally, NMPA and DiMA note that there are provisions within Part 385 that may need to be modified at or around the time the MLC becomes operational in 2021, namely, provisions that govern the complex calculation of royalties due for streaming and other digital uses under Section 115, and the related accounting provision.⁴⁶ While Section 115(d)(4)(A) requires certain usage data to be reported to the MLC by compulsory licensees,⁴⁷ the Register of Copyrights is authorized to establish more specific requirements for the content and format of these reports.⁴⁸ Depending on how the reporting structure is implemented, certain aspects of the calculation methodology in Part 385 may need to be revised.⁴⁹

CONCLUSION

NMPA and DiMA appreciate this opportunity to assist the CRJs in adopting new and revised regulations to implement the MMA, including the proceedings to determine

⁴⁴ *Id.* § 355.5(d).

⁴⁵ *Id.* § 355.6; *see also* 17 U.S.C. § 115(d)(7)(D)(ii)–(vi).

⁴⁶ *See generally* 37 C.F.R. § 385 subpart C.

⁴⁷ Similarly, 17 U.S.C. § 115(d)(6)(A)(ii) requires certain usage data to be reported to the MLC by significant nonblanket licensees.

⁴⁸ 17 U.S.C. § 115(d)(4)(A).

⁴⁹ In the CRJs’ final determination in the *Phonorecords III* proceeding, the CRJs acknowledged the need for the Copyright Office to address certain accounting provisions in Part 210 of 37 C.F.R. *See Phonorecords III Determination* at 93–94.

administrative assessments to fund the MLC. The proposed procedural regulations set forth in Appendix A, though not actually required under the MMA, are expressly contemplated by the MMA, and would benefit both the CRJs and all participants in the administrative assessment proceedings by instilling greater efficiency and certainty into the process. At the same time, the MMA does mandate conforming changes to existing Section 115 royalty ratesetting definitions; NMPA and DiMA's proposed changes to these definitions are set forth in Appendix B. NMPA and DiMA look forward to continuing to support the CRJs' efforts to implement the MMA as this rulemaking process continues.

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Appendix A

PART 355—ADMINISTRATIVE ASSESSMENT PROCEEDINGS

AUTHORITY: 17 U.S.C. § 801; 17 U.S.C. § 115

§ 355.1 Proceedings in general.

- a) *Scope.* This Part governs procedures generally applicable to proceedings before the Copyright Royalty Judges to determine or adjust the Administrative Assessment pursuant to the Copyright Act, 17 U.S.C. § 115(d), including procedures for the Copyright Royalty Judges to make necessary evidentiary or procedural rulings.
- b) *Definitions.* Capitalized terms in this Part that are defined terms in 17 U.S.C. § 115(e) shall have the same meaning as set forth in 17 U.S.C. § 115(e).
- c) *Rulings.* The Copyright Royalty Judges may make any necessary procedural or evidentiary rulings in any proceeding under this Part and may, before commencing a proceeding under this Part, make any such rulings that would apply to the proceedings conducted by the Copyright Royalty Judges.
- d) *Role of Chief Judge.* The Chief Copyright Royalty Judge, or an individual Copyright Royalty Judge designated by the Chief Copyright Royalty Judge, shall:
 - 1) administer oaths and affirmations to any witnesses; and
 - 2) rule on objections and motions.
- e) *Inability to designate Digital Licensee Coordinator.* If the Register of Copyrights declines to designate a Digital Licensee Coordinator in accordance with 17 U.S.C. § 115(d)(5), any reference to actions of the Digital Licensee Coordinator in this Part shall be without effect unless and until a new Digital Licensee Coordinator is designated.

§ 355.2 Commencement of proceedings.

- a) *Commencement of initial Administrative Assessment proceeding.* The proceeding to determine the initial Administrative Assessment shall be commenced by the Copyright Royalty Judges by publication of a notice in the Federal Register no later than July 8, 2019, seeking the filing of petitions to participate in the proceeding.
- b) *Petition to adjust the Administrative Assessment.* Following the determination of the initial Administrative Assessment, the Mechanical Licensing Collective, the Digital Licensee Coordinator, or one or more interested copyright owners, Digital Music Providers, or Significant Nonblanket Licensees may file a petition with the Copyright Royalty Judges to commence a proceeding to adjust the Administrative Assessment. A petition under this paragraph (b) shall be considered a petition to participate and shall include the information required under paragraph (f) of this section. Any such petition shall be filed during the month of May and may not be filed earlier than 1 year following

the most recent publication of a determination of the Administrative Assessment by the Copyright Royalty Judges.

- c) *Commencement of proceeding to adjust the Administrative Assessment.* The Copyright Royalty Judges shall commence a proceeding to adjust the Administrative Assessment by publication of a notice of commencement in the Federal Register in the month of June following receipt of a petition under paragraph (b). The notice shall seek additional petitions to participate in the proceeding to adjust the Administrative Assessment and shall also set forth a schedule for the submission of relevant information, as well as a schedule for the proceeding, as provided in paragraph (h).
- d) *Required participants.* The Mechanical Licensing Collective and the Digital Licensee Coordinator shall each file a petition and participate in each Administrative Assessment proceeding under this section.
- e) *Other eligible participants.* A copyright owner, Digital Music Provider, or Significant Nonblanket Licensee may also seek to participate by filing a petition to participate.
- f) *Petitions to participate.*
 - 1) *Contents.* Each petition to participate filed under this section must include:
 - i. the identity and a description of the petitioner, and a description of the petitioner's significant interest in the proceeding, as described in paragraph (g); and
 - ii. the full name, address, telephone number, and email address of the person filing the petition.
 - 2) *Timing.* Each petition to participate filed under paragraph (a) or (c) must be filed within 30 days of the publication of the notice of commencement in the Federal Register.
- g) *Acceptance and rejection of participants.* A petition to participate filed by a petitioner described in paragraph (e) will be accepted by the Copyright Royalty Judges only upon a finding that the petitioner has a significant interest in the proceeding and that the petition is otherwise valid and timely filed. For purposes of this paragraph (g), petitions to participate must set forth factual information sufficient to establish that the petitioner has a significant interest in the determination of the Administrative Assessment itself, which interest shall not be satisfied solely by a showing of an interest in the activities of the Mechanical Licensing Collective or the Digital Licensee Coordinator. The Mechanical Licensing Collective, the Digital Licensee Coordinator, and any other petitioner that has filed a valid petition to participate may file an opposition to any petition within 14 days of the filing of such petition on the grounds that the petitioner lacks a significant interest in the proceeding or the petition is otherwise invalid or untimely; provided, however, that a petition to participate submitted by the Mechanical Licensing Collective or the Digital Licensee Coordinator shall not be subject to opposition or rejection.
- h) *Schedules for submissions and hearing.*

- 1) For both the initial Administrative Assessment under paragraph (a) and any proceeding to adjust the Administrative Assessment under paragraph (c), the Copyright Royalty Judges shall establish and make known a schedule for submission of information that may be relevant to establishing or adjusting the Administrative Assessment, as well as a schedule setting forth the dates for the proceeding. For a proceeding commenced under paragraph (c), the Copyright Royalty Judges shall publish such schedules in the Federal Register notice of commencement. Such schedules shall set forth relevant dates for the following:
 - i. An initial voluntary negotiation period of 60 days, which shall commence on the date of commencement under paragraph (a) or (c), as applicable;
 - ii. An initial submission by the Mechanical Licensing Collective, with concurrent production of required documents and disclosures, which initial submission shall be filed with the Copyright Royalty Judges within 60 days of the date of commencement of the proceeding under paragraph (a) or (c), as applicable;
 - iii. A period of 75 days for the Digital Licensee Coordinator and any other participant in the proceeding, other than the Mechanical Licensing Collective, to engage in additional discovery pursuant to § 355.3(d), such period to begin upon the day after the due date for filing of the initial submission by the Mechanical Licensing Collective;
 - iv. Responsive submissions by the Digital Licensee Coordinator and any other participant in the proceeding, with concurrent production of required documents and disclosures, which submissions shall be filed with the Copyright Royalty Judges within 75 days following the filing of the initial submission by the Mechanical Licensing Collective;
 - v. A period of 60 days for the Mechanical Licensing Collective to engage in additional discovery of the Digital Licensee Coordinator and any other participant in the proceeding pursuant to § 355.3(g), such period to begin upon the day after the due date for filing of responsive submissions under paragraph (h)(1)(iv);
 - vi. A second voluntary negotiation period of 14 days, which shall commence 14 days prior to the end of the discovery period for the Mechanical Licensing Collective under paragraph (h)(1)(v);
 - vii. A written reply submission, if any, by the Mechanical Licensing Collective, which shall be filed with the Copyright Royalty Judges within 60 days following the due date for filing of responsive submissions under paragraph (h)(1)(iv);
 - viii. A joint pre-hearing submission by the Mechanical Licensing Collective, the Digital Licensee Coordinator, and any other participant in the hearing referenced in paragraph (h)(1)(ix), which shall be filed with the Copyright

Royalty Judges no later than 14 days prior to the commencement of the hearing under paragraph (h)(1)(ix);

- ix. A hearing, which shall commence no later than 30 days after the end of the second voluntary negotiation period; and
 - x. The latest possible date for issuance of a determination by the Copyright Royalty Judges, which shall occur no later than 12 months following the date of commencement of the Administrative Assessment proceeding under paragraph (a) or (c), as applicable.
- 2) Subject to § 355.6(b), the schedules referenced in this paragraph (h) may be modified by the Copyright Royalty Judges for good cause shown and upon reasonable notice to the participants.

§ 355.3 Submissions and discovery.

- a) *Protective orders.* During the initial voluntary negotiation period, the Mechanical Licensing Collective and the Digital Licensee Coordinator shall negotiate and agree upon a written protective order to preserve the confidentiality of any documents, depositions, or other information exchanged or filed by the participants in the proceeding. The protective order shall be submitted for review and approval by the Copyright Royalty Judges no later than 30 days after the commencement of the proceeding. No confidential documents, depositions, or other information shall be provided to or exchanged with any other participant in the proceeding unless and until that participant affirms its consent in writing to the protective order governing the proceeding.
- b) *Initial submission by the Mechanical Licensing Collective in the initial Administrative Assessment proceeding.* The Mechanical Licensing Collective shall file an initial submission with the Copyright Royalty Judges in accordance with the schedule adopted by the Copyright Royalty Judges pursuant to § 355.2(h).
 - 1) Such initial submission shall consist of a written statement, including any written testimony and accompanying exhibits, setting forth and providing support for the proposed initial Administrative Assessment to fund reasonable Collective Total Costs, including the reasons why the proposal fulfills the requirements set forth in 17 U.S.C. § 115(d)(7) and each of the elements of §§ 355.6(a)(1)-(5).
 - 2) Concurrently with the filing of the initial submission, the Mechanical Licensing Collective shall electronically produce documents to the other participants in the proceeding that identify and demonstrate:
 - i. the actual and anticipated Collective Total Costs through the License Availability Date and 3 years thereafter, including overall operating costs and expenses;

- ii. anticipated collections from Digital Music Providers and Significant Nonblanket Licensees, beginning upon the License Availability Date and through the following 3-year period;
 - iii. any voluntary contributions by Digital Music Providers and Significant Nonblanket Licensees to the Mechanical Licensing Collective for the relevant periods;
 - iv. the reasonableness of the Collective Total Costs; and
 - v. the reasons why the proposal fulfills the requirements set forth in 17 U.S.C. § 115(d)(7) and each of the elements of §§ 355.6(a)(1)-(5).
- 3) Concurrently with the filing of the initial submission, the Mechanical Licensing Collective shall electronically provide written disclosures to the other participants in the proceeding that:
 - i. list the individuals with the most material knowledge of, and availability to provide testimony concerning, the proposed initial Administrative Assessment; and
 - ii. for each such individual, set forth the subject(s) of his or her knowledge.
- c) *Initial submission by the Mechanical Licensing Collective in proceedings to adjust the Administrative Assessment.* The Mechanical Licensing Collective shall file an initial submission with the Copyright Royalty Judges in accordance with the schedule adopted by the Copyright Royalty Judges pursuant to § 355.2(h).
 - 1) Such submission shall consist of a written statement, including any written testimony and accompanying exhibits, setting forth and providing support for a proposal to maintain or adjust the Administrative Assessment to fund reasonable Collective Total Costs, including the reasons why such proposal fulfills the requirements set forth in 17 U.S.C. § 115(d)(7) and each of the elements of §§ 355.6(a)(1)-(5).
 - 2) Concurrently with the filing of the initial submission, the Mechanical Licensing Collective shall electronically produce documents to the other participants in the proceeding that identify and demonstrate:
 - i. the actual and anticipated Collective Total Costs for the preceding 3 calendar years and the 3 calendar years following thereafter, including overall operating costs and expenses;
 - ii. for the preceding 3 calendar years, any amount of actual Collective Total Costs that was not sufficiently funded by the prior Administrative Assessment, or any surplus from the prior Administrative Assessment after funding actual Collective Total Costs;
 - iii. actual and anticipated collections from Digital Music Providers and Significant Nonblanket Licensees for the preceding 3 calendar years and the 3 calendar years following thereafter;

- iv. any voluntary contributions by Digital Music Providers and Significant Nonblanket Licensees to the Mechanical Licensing Collective for the relevant periods;
 - v. the reasonableness of the Collective Total Costs; and
 - vi. the reasons why the proposal fulfills the requirements set forth in 17 U.S.C. § 115(d)(7) and each of the elements of §§ 355.6(a)(1)-(5).
- 3) Concurrently with the filing of the initial submission, the Mechanical Licensing Collective shall electronically provide written disclosures to the other participants in the proceeding that:
- i. list the individuals with the most material knowledge of, and availability to provide testimony concerning, the proposed adjusted Administrative Assessment; and
 - ii. for each such individual, set forth the subject(s) of his or her knowledge.
- d) *First discovery period.*
- 1) During the discovery period set forth in § 355.2(h)(1)(iii), the Digital Licensee Coordinator (or if no Digital Licensee Coordinator has been designated, interested Digital Music Providers and Significant Nonblanket Licensees representing more than half of the market for uses of musical works in Covered Activities, acting collectively), and any other participant in the proceeding other than the Mechanical Licensing Collective, may serve requests for additional documents on the Mechanical Licensing Collective and any other participant in the proceeding. Any such document request shall be limited to nonprivileged documents that are:
 - i. relevant to consideration of whether the proposal fulfills the requirements set forth in 17 U.S.C. § 115(d)(7) and each of the elements of §§ 355.6(a)(1)-(5); and
 - ii. not unduly burdensome to produce.
 - 2) In addition, the Digital Licensee Coordinator (or if no Digital Licensee Coordinator has been designated, interested Digital Music Providers and Significant Nonblanket Licensees representing more than half of the market for uses of musical works in Covered Activities, acting collectively) may notice and take depositions as provided in paragraph (e).
- e) *Depositions.* The Digital Licensee Coordinator (or if no Digital Licensee Coordinator has been designated, interested Digital Music Providers and Significant Nonblanket Licensees representing more than half of the market for uses of musical works in Covered Activities, acting collectively) may take up to 5 depositions during the discovery period set forth in § 355.2(h)(1)(iii). The Mechanical Licensing Collective may take up to 5 depositions during the discovery period set forth in § 355.2(h)(1)(v). Any deposition under this paragraph shall be no longer than 7 hours in duration, with each deponent subject to a maximum of 1 deposition in any one Administrative Assessment proceeding. All other participants in the proceeding may attend any such depositions and, except as

otherwise agreed by those attending the deposition, shall be provided an opportunity to examine the deponent during the final hour of the deposition. A notice of deposition for any deposition taken under this paragraph must be served by electronic means on all participants in the proceeding no later than 7 days prior to the scheduled deposition date, absent good cause shown.

f) *Responsive submissions by the Digital Licensee Coordinator and other participants.* The Digital Licensee Coordinator and any participants in the proceeding other than the Mechanical Licensing Collective shall file responsive submissions with the Copyright Royalty Judges in accordance with the schedule adopted by the Copyright Royalty Judges pursuant to § 355.2(h).

- 1) Such submissions shall consist of a written statement, including any written testimony and accompanying exhibits, stating whether the participant agrees with the Administrative Assessment proposed by the Mechanical Licensing Collective. If the participant disagrees with all or part of the Administrative Assessment proposed by the Mechanical Licensing Collective, then such written statement, including any written testimony and accompanying exhibits, shall include analysis necessary to demonstrate why the Administrative Assessment proposed by the Mechanical Licensing Collective does not fulfill the requirements set forth in 17 U.S.C. § 115(d)(7) or one or more of the elements of §§ 355.6(a)(1)-(5).
- 2) Concurrently with the filing of a responsive submission indicating disagreement with the Administrative Assessment proposed by the Mechanical Licensing Collective, the participant filing such submission shall electronically produce documents to the other participants in the proceeding that demonstrate why the Administrative Assessment proposed by the Mechanical Licensing Collective does not fulfill the requirements set forth in 17 U.S.C. § 115(d)(7) or one or more of the elements of §§ 355.6(a)(1)-(5).
- 3) Concurrently with the filing of responsive submission(s), the Digital Licensee Coordinator and any other participants in the proceeding shall electronically provide written disclosures to the other participants in the proceeding that:
 - i. list the individuals with the most material knowledge of, and availability to provide testimony concerning, the reasons why the Administrative Assessment proposed by the Mechanical Licensing Collective does not fulfill the requirements set forth in 17 U.S.C. § 115(d)(7) or one or more of the elements of §§ 355.6(a)(1)-(5); and
 - ii. for each such individual, set forth the subject(s) of his or her knowledge.

g) *Second discovery period.*

- 1) During the discovery period set forth in § 355.2(h)(1)(v), the Mechanical Licensing Collective may serve requests for additional documents on the other participants in the proceeding. Any such document request shall be limited to nonprivileged documents that are:

- i. relevant to consideration of whether the proposal fulfills the requirements set forth in 17 U.S.C. § 115(d)(7) or one or more of the elements of §§ 355.6(a)(1)-(5); and
 - ii. not unduly burdensome to produce.
 - 2) In addition, the Mechanical Licensing Collective may notice and take depositions as provided in paragraph (e).
- h) *Discovery disputes.*
 - 1) In the event that 2 or more participants are unable to resolve a discovery dispute after good-faith consultation, a participant requesting discovery may submit a letter brief of no more than 3 pages to the Copyright Royalty Judges. For a dispute involving the provision of documents or deposition testimony, such letter brief shall set forth the reasons that:
 - i. the documents or deposition testimony already provided by the responding participant is inadequate to support or evaluate the claims or analysis set forth in the responding participant's submission(s) under paragraph (b), (c), or (f), as applicable;
 - ii. the additional documents or deposition testimony sought is relevant to such claims or analysis; and
 - iii. the documents or deposition testimony sought is not unduly burdensome to produce or otherwise provide.
 - 2) The responding participant may submit a responsive letter brief of no more than 3 pages within 2 business days of the submission of the initial letter brief.
 - 3) Absent unusual circumstances, the Chief Copyright Royalty Judge, or an individual Copyright Royalty Judge designated by the Chief Copyright Royalty Judge shall, applying the criteria set forth in paragraph (h)(1)(i)-(iii) (if applicable), rule on the dispute within 3 business days of the filing of the responsive letter brief. Upon reasonable notice to the participants, the Chief Copyright Royalty Judge, or an individual Copyright Royalty Judge designated by the Chief Copyright Royalty Judge may consider and rule on any such dispute in a telephone conference with the relevant participants.
- i) *Reply submissions by the Mechanical Licensing Collective.* The Mechanical Licensing Collective may file a written reply submission addressed to the issues raised in any responsive submission(s) filed under paragraph (f), in accordance with the schedule adopted by the Copyright Royalty Judges pursuant to § 355.2(h), which reply may include written testimony, documentation, and analysis addressed to the issues raised in such responsive submission(s).
- j) *Joint pre-hearing submission.* No later than 14 days prior to the commencement of the hearing, the Mechanical Licensing Collective, the Digital Licensee Coordinator, and any other hearing participants shall jointly file a written submission with the Copyright Royalty Judges, consisting of a list of:

- 1) specific areas of agreement between the participants; and
- 2) the remaining issues in dispute with respect to the determination of the Administrative Assessment.

§ 355.4 Voluntary negotiation periods.

- a) *Initial voluntary negotiation period.* The initial voluntary negotiation period shall last for 60 days, by the close of which the Mechanical Licensing Collective and the Digital Licensee Coordinator (or if no Digital Licensee Coordinator has been designated, interested Digital Music Providers and Significant Nonblanket Licensees representing more than half of the market for uses of musical works in Covered Activities) shall jointly provide written notification to the Copyright Royalty Judges as to whether a settlement, in whole or in part, has been reached with respect to the determination of the Administrative Assessment.
- b) *Second voluntary negotiation period.* The second voluntary negotiation period shall last for 14 days, by the close of which the Mechanical Licensing Collective and the Digital Licensee Coordinator (or if no Digital Licensee Coordinator has been designated, interested Digital Music Providers and Significant Nonblanket Licensees representing more than half of the market for uses of musical works in Covered Activities) shall jointly provide written notification to the Copyright Royalty Judges as to whether a settlement, in whole or in part, has been reached with respect to the determination of the Administrative Assessment.

§ 355.5 Hearing procedures.

- a) *En banc panel.* The hearing referenced in § 355.2(h)(1)(ix) shall be conducted by the Copyright Royalty Judges sitting *en banc*.
- b) *Attendance and participation.* The Mechanical Licensing Collective and the Digital Licensee Coordinator shall attend and participate in the hearing. Any other participant in the Administrative Assessment proceeding who has actively participated in the proceeding is also eligible to participate in the hearing. If the Copyright Royalty Judges find, *sua sponte* or upon motion of a participant, that a participant has failed substantially to comply with all of the requirements of § 355.3, the Copyright Royalty Judges shall exclude such participant from the hearing; provided, however, that the Mechanical Licensing Collective and the Digital Licensee Coordinator shall not be subject to exclusion.
- c) *Admission of written submissions, deposition transcripts, and other documents.* Subject to any valid objections of a hearing participant, the Copyright Royalty Judges shall admit into evidence at the Administrative Assessment hearing the complete initial and responsive submissions, and reply submission, that have been filed by the participants

pursuant to § 355.3, as well as deposition transcripts for depositions taken pursuant to § 355.3(e). During the hearing, upon the oral request of any hearing participant, any other document introduced by any hearing participant shall be admitted into evidence so long as that document is relevant to an issue in dispute and was previously produced by any participant pursuant to § 355.3, subject to any valid objections of another hearing participant.

- d) *Argument and examination of witnesses.* Absent a finding by the Copyright Royalty Judges, either *sua sponte* or upon written or oral request of a participant, that there exists good cause for examination of one or more witnesses at the hearing, the Administrative Assessment hearing shall consist of arguments by the participants addressed to the written submissions of the participants. Any examination of witnesses at the hearing shall be limited to witnesses who have submitted written testimony or who were deposed in the proceeding, and shall not exceed the subject matter of their written or deposition testimony. All witnesses shall be required to take an oath or affirmation before testifying. The Copyright Royalty Judges may issue an order that a witness, other than a party representative, may not listen to, or review a transcript of, testimony of another witness or witnesses.
- e) *Objections.* Participants are entitled to raise objections to evidence on any proper ground, by written or oral objection, including on the ground that a participant seeking to offer evidence for admission has not complied with § 355.3. Hearsay may be admitted to the extent deemed appropriate by the Copyright Royalty Judges.
- f) *Transcript and record.* The Copyright Royalty Judges shall designate an official reporter for the recording and transcribing of hearings. Anyone wishing to inspect the transcript of a hearing may do so at the offices of the Copyright Royalty Judges. Additionally, any participant in the proceeding may request an electronic copy of the transcript of any hearing from the Copyright Royalty Judges, which shall be provided to the requesting participant upon payment of the costs associated with providing such transcript.

§ 355.6 Determinations.

- a) *How made.* The Copyright Royalty Judges shall determine the amount and terms of the Administrative Assessment in accordance with 17 U.S.C. § 115(d)(7) based on the totality of the evidence before them, including written submissions and deposition testimony pursuant to § 355.3, the record associated with any motions and objections by participants, and the hearing conducted under § 355.5. Such determination:
 - 1) Shall be wholly independent of royalty rates and terms applicable to Digital Music Providers, which shall not be taken into consideration in any manner in establishing the Administrative Assessment;
 - 2) Shall be established by the Copyright Royalty Judges in an amount that is calculated to defray the reasonable Collective Total Costs;

- 3) Shall be assessed based on usage of musical works by Digital Music Providers and Significant Nonblanket Licensees in Covered Activities under both compulsory and nonblanket licenses;
 - 4) May be in the form of a percentage of royalties payable under 17 U.S.C. § 115 for usage of musical works in Covered Activities (regardless of whether a different rate applies under a voluntary license), or any other usage-based metric reasonably calculated to equitably allocate the Collective Total Costs across Digital Music Providers and Significant Nonblanket Licensees engaged in Covered Activities, and shall include as a component a minimum fee for all Digital Music Providers and Significant Nonblanket Licensees;
 - 5) Shall take into consideration anticipated future Collective Total Costs and collections of the Administrative Assessment, including, as applicable:
 - i. any portion of past actual Collective Total Costs of the Mechanical Licensing Collective not funded by previous collections of the Administrative Assessment or voluntary contributions because such collections or contributions together were insufficient to fund such costs;
 - ii. any past collections of the Administrative Assessment and voluntary contributions that exceeded past actual Collective Total costs, resulting in a surplus; and
 - iii. the amount of any voluntary contributions by Digital Music Providers or Significant Nonblanket Licensees in relevant periods.
- b) *Timing.* The Copyright Royalty Judges shall issue and publish their determination, which shall be supported by a written record, in the Federal Register not later than 1 year after commencement of the proceeding under § 355.2(a) or, in a proceeding commenced under § 355.2(c), during June of the calendar year following the commencement of such proceeding.
- c) *Effectiveness.*
- 1) The initial Administrative Assessment determined in the proceeding under § 355.2(a) shall be effective as of the License Availability Date and shall continue in effect unless and until an adjusted Administrative Assessment is established pursuant to an adjustment proceeding under § 355.2(c).
 - 2) Any adjusted Administrative Assessment determined in a proceeding under § 355.2(c) shall take effect January 1 of the year following its publication in the Federal Register.
- d) *Adoption of voluntary agreements.* In lieu of reaching their own determination, the Copyright Royalty Judges shall approve and adopt a negotiated agreement to establish the amount and terms of the Administrative Assessment that has been agreed by the Mechanical Licensing Collective and the Digital Licensee Coordinator (or if no Digital Licensee Coordinator has been designated, interested Digital Music Providers and Significant Nonblanket Licensees representing more than half of the market for uses of

musical works in Covered Activities) pursuant to § 355.4. Notwithstanding the foregoing, however, the Copyright Royalty Judges shall have the discretion to reject any such agreement for good cause shown.

- e) *Continuing authority to amend.* The Copyright Royalty Judges shall retain continuing authority to amend a determination of an Administrative Assessment to correct technical or clerical errors, or modify the terms of implementation, for good cause, with any such amendment to be published in the Federal Register.

Appendix B

Updated Regulatory Terms

PART 350—GENERAL ADMINISTRATIVE PROVISIONS

§ 350.1 Scope.

This subchapter governs procedures generally applicable to proceedings before the Copyright Royalty Judges in making determinations and adjustments pursuant to the Copyright Act, 17 U.S.C. 801(b), but shall not apply to determinations to establish the administrative assessment proceedings pursuant to 17 U.S.C. 115(d), except for §§350.2, 350.3, 350.4, 350.5, 350.6, 350.7 and 350.8.

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PART 385—RATES AND TERMS FOR USE OF NONDRAMATIC MUSICAL WORKS IN THE MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS

Subpart A – Regulations of General Application

§385.1 General
§385.2 Definitions
§385.3 Late Payments
§385.4 Recordkeeping for non royalty-bearing uses

Subpart B – Physical Phonorecord Deliveries, Permanent ~~Digital~~ Downloads, Ringtones, and Music Bundles

§385.10 Scope
§385.11 Royalty Rates

Subpart C – Eligible Interactive Streaming, Eligible Limited Downloads, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations

§385.20 Scope
§385.21 Royalty Rates and Calculations

Subpart D – Promotional and Free-to-the-User Offerings

§385.30 Scope
§385.31 Royalty Rates

Subpart A—Regulations of General Application

§385.1 General.

(a) Scope. This part 385 establishes rates and terms of royalty payments for the use of nondramatic musical works in making and distributing of physical and digital phonorecords in accordance with the provisions of 17 U.S.C. 115. This subpart A contains regulations of general application to the making and distributing of phonorecords subject to the section 115 license.

(b) Legal compliance. Licensees relying on the compulsory license detailed in 17 U.S.C. 115 shall comply with the requirements of that section, the rates and terms of this part, and any other applicable regulations. This part 385 describes rates and terms for the compulsory license only.

(c) Interpretation. This part 385 is intended only to set rates and terms for situations in which the exclusive rights of a Copyright Owner are implicated and a compulsory license pursuant to 17 U.S.C. 115 is obtained. Neither the part nor the act of obtaining a license under 17 U.S.C. 115 is intended to express or imply any conclusion as to the circumstances in which a user must obtain a compulsory license pursuant to 17 U.S.C. 115.

(d) Relationship to voluntary agreements. The rates and terms of any license agreements entered into by Copyright Owners and Licensees relating to use of musical works within the scope of those license agreements shall apply in lieu of the rates and terms of this part.

§385.2 Definitions.

Accounting Period means the monthly period specified in 17 U.S.C. 115(c)(~~52~~)(I) and in 17 U.S.C. 115(d)(4)(A)(i), and any related regulations, as applicable.

Affiliate means an entity controlling, controlled by, or under common control with another entity, except that an affiliate of a Sound #Recording eCompany shall not include a Copyright Owner to the extent it is engaging in business as to musical works.

Bundled Subscription Offering means a Subscription Offering providing Licensed Activity consisting of Streams or Eligible Limited Downloads that is made available to End Users with one or more other products or services (including products or services subject to other subparts) as part of a single transaction without pricing for the subscription service providing Licensed Activity separate from the product(s) or service(s) with which it is made available (e.g., a case in which a user can buy a portable device and one-year access to a subscription service providing Licensed Activity for a single price),

Copyright Owner(s) are nondramatic musical works copyright owners who are entitled to royalty payments made under this part 385 pursuant to the compulsory license under 17 U.S.C. 115.

Digital Phonorecord Delivery ~~or DPD~~ has the same meaning as in 17 U.S.C. 115(ed).

Eligible Interactive Stream means a Stream, where the performance of the sound recording by means of the Stream is not exempt from the sound recording performance royalty under 17 U.S.C. 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under 17 U.S.C. 114(d)(2). *An Eligible Interactive Stream is a digital phonorecord delivery.*

Eligible Limited Download means a transmission of a sound recording embodying a musical work to an End User of a digital phonorecord under 17 U.S.C. 115(c)(3)(C) and (D) that results in a Digital Phonorecord Delivery of that sound recording that is only accessible for listening for—

(1) An amount of time not to exceed one month from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another *Eligible Limited Download*, separately and upon specific request of the End User made through a live network connection, reauthorizes use for another time period not to exceed one month), or in the case of a subscription plan, a period of time following the end of the applicable subscription no longer than a subscription renewal period or three months, whichever is shorter; or

(2) A number of times not to exceed 12 (unless the Licensee, in lieu of retransmitting the same sound recording as another *Eligible Limited Download*, separately and upon specific request of the End User made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.

End User, for the purposes of this part 385, means each unique person that (a) pays a subscription fee for an Offering during the relevant Accounting Period or (b) makes at least one Play during the relevant Accounting Period.

Family Plan means a discounted subscription to be shared by two or more family members for a single subscription price.

Free Trial Offering means a subscription to a *Service ProviderService*'s transmissions of sound recordings embodying musical works when

(1) Neither the *Service ProviderService*, the *Sound Recording* Company, the Copyright Owner, nor any person or entity acting on behalf of or in lieu of any of them receives any monetary consideration for the Offering;

(2) The free usage does not exceed 30 consecutive days per subscriber per two-year period;

(3) In connection with the Offering, the *Service ProviderService* is operating with appropriate musical license authority and complies with the recordkeeping requirements in section 385.4;

(4) Upon receipt by the ~~Service Provider~~Service of written notice from the Copyright Owner or its agent stating in good faith that the ~~Service Provider~~Service is in a material manner operating without appropriate license authority from the Copyright Owner under 17 U.S.C. 115, the ~~Service Provider~~Service shall within 5 business days cease transmission of the sound recording embodying that musical work and withdraw it from the repertoire available as part of a Free Trial Offering;

(5) The Free Trial Offering is made available to the End User free of any charge; and

(6) The ~~Service Provider~~Service offers the End User periodically during the free usage an opportunity to subscribe to a non-free Offering of the ~~Service Provider~~Service.

GAAP means U.S. Generally Accepted Accounting Principles in effect at the relevant time, except that if the U.S. Securities and Exchange Commission permits or requires entities with securities that are publicly traded in the U.S. to employ International Financial Reporting Standards in lieu of Generally Accepted Accounting Principles, then that entity may employ International Financial Reporting Standards as “GAAP” for purposes of this subpart.

~~Interactive Stream means a Stream, where the performance of the sound recording by means of the Stream is not exempt from the sound recording performance royalty under 17 U.S.C. 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under 17 U.S.C. 114(d)(2).~~

Licensee means any entity availing itself of the compulsory license under 17 U.S.C. 115 to use copyrighted musical works in the making or distributing of physical or digital phonorecords.

Licensed Activity, as the term is used in subpart B of this part 385, means delivery of musical works, under voluntary or statutory license, via physical phonorecords and Digital Phonorecord Deliveries in connection with Permanent ~~Digital~~ Downloads, Ringtones, and Music Bundles; and, as the term is used in subparts C and D of this part 385, means delivery of musical works, under voluntary or statutory license, via Digital Phonorecord Deliveries in connection with Eligible Interactive Streams, Eligible Limited Downloads, Limited Offerings, mixed Bundles, and Locker Services.

~~Limited Download means a transmission of a sound recording embodying a musical work to an End User of a digital phonorecord under 17 U.S.C. 115(e)(3)(C) and (D) that results in a Digital Phonorecord Delivery of that sound recording that is only accessible for listening for~~

~~(1) An amount of time not to exceed one month from the time of the transmission (unless the Licensee, in lieu of retransmitting the same sound recording as another limited download, separately and upon specific request of the End User made through a live network connection, reauthorizes use for another time period not to exceed one month), or in the case of a subscription plan, a period of time following the end of the applicable subscription no longer than a subscription renewal period or three months, whichever is shorter, or~~

~~(2) A number of times not to exceed 12 (unless the Licensee, in lieu of retransmitting the same sound recording as another Limited Download, separately and upon specific request of the End User made through a live network connection, reauthorizes use of another series of 12 or fewer plays), or in the case of a subscription transmission, 12 times after the end of the applicable subscription.~~

Limited Offering means a subscription plan providing Eligible Interactive Streams or Eligible Limited Downloads for which—

(1) An End User cannot choose to listen to a particular sound recording (i.e., the Service Provider~~Service~~ does not provide Eligible Interactive Streams of individual recordings that are on-demand, and Eligible Limited Downloads are rendered only as part of programs rather than as individual recordings that are on-demand); or

(2) The particular sound recordings available to the End User over a period of time are substantially limited relative to Service Providers~~Services~~ in the marketplace providing access to a comprehensive catalog of recordings (e.g., a product limited to a particular genre or permitting Eligible Interactive Streaming only from a monthly playlist consisting of a limited set of recordings).

Locker Service means an Offering providing digital access to sound recordings of musical works in the form of Eligible Interactive Streams, Permanent ~~Digital~~ Downloads, Restricted Downloads or Ringtones where the Service Provider~~Service~~ has reasonably determined that the End User has purchased or is otherwise in possession of the subject phonorecords of the applicable sound recording prior to the End User's first request to use the sound recording via the Locker Service. The term Locker Service does not mean any part of a Service Provider~~Service~~'s products otherwise meeting this definition, but as to which the Service Provider~~Service~~ has not obtained a section 115 license.

Mixed Service Bundle means one or more of Permanent ~~Digital~~ Downloads, Ringtones, Locker Services, or Limited Offerings a Service Provider~~Service~~ delivers to End Users together with one or more non-music services (e.g., Internet access service, mobile phone service) or non-music products (e.g., a telephone device) of more than token value and provided to users as part of one transaction without pricing for the music services or music products separate from the whole Offering.

Music Bundle means two or more of physical phonorecords, Permanent ~~Digital~~ Downloads or Ringtones delivered as part of one transaction (e.g., download plus ringtone, CD plus downloads). In the case of Music Bundles containing one or more physical phonorecords, the Service Provider~~Service~~ must sell the physical phonorecord component of the Music Bundle under a single catalog number, and the musical works embodied in the Digital Phonorecord Delivery configurations in the Music Bundle must be the same as, or a subset of, the musical works embodied in the physical phonorecords; provided that when the Music Bundle contains a set of Digital Phonorecord Deliveries sold by the same Sound Recording Company under substantially the same title as the physical phonorecord (e.g., a corresponding digital album), the

Service ProviderService may include in the same bundle up to 5 sound recordings of musical works that are included in the stand-alone version of the set of digital phonorecord deliveries but not included on the physical phonorecord. In addition, the Service ProviderService must permanently part with possession of the physical phonorecord or phonorecords it sells as part of the Music Bundle. In the case of Music Bundles composed solely of digital phonorecord deliveries, the number of digital phonorecord deliveries in either configuration cannot exceed 20, and the musical works embodied in each configuration in the Music Bundle must be the same as, or a subset of, the musical works embodied in the configuration containing the most musical works.

Offering means a Service ProviderService's engagement in Licensed Activity covered by subparts C and D of this part 385.

Paid Locker Service means a Locker Service for which the End User pays a fee to the Service ProviderService.

Performance Royalty means the license fee payable for the right to perform publicly musical works in any of the forms covered by subparts C and D this part 385.

Permanent ~~Digital Download or PDD~~ has the same meaning as in 17 U.S.C. 115(e). ~~means a Digital Phonorecord Delivery in a form that the End User may retain on a permanent basis and replay at any time.~~

Play means an Eligible Interactive Stream, or play of an Eligible Limited Download, lasting 30 seconds or more and, if a track lasts in its entirety under 30 seconds, an Eligible Interactive Stream or play of an Eligible Limited Download of the entire duration of the track. A Play excludes an Eligible Interactive Stream or play of an Eligible Limited Download that has not been initiated or requested by a human user. If a single End User plays the same track more than 50 straight times, all plays after play 50 shall be deemed not to have been initiated or requested by a human user.-

Promotional Offering means a digital transmission of a sound recording, in the form of an Eligible Interactive Stream or an Eligible Limited Download, embodying a musical work, the primary purpose of which is to promote the sale or other paid use of that sound recording or to promote the artist performing on that sound recording and not to promote or suggest promotion or endorsement of any other good or service and

(1) a Sound Recording Company is lawfully distributing the sound recording through established retail channels or, if the sound recording is not yet released, the Sound Recording Company has a good faith intention to lawfully distribute the sound recording or a different version of the sound recording embodying the same musical work;

(2) for Eligible Interactive Streaming or Eligible Limited Downloads, the Sound Recording Company requires a writing signed by an authorized representative of the Service ProviderService representing that the Service ProviderService is operating with appropriate

musical works license authority and that the Service ProviderService is in compliance with the recordkeeping requirements of section 385.4;

(3) for Eligible Interactive Streaming of segments of sound recordings not exceeding 90 seconds, the Sound Recording Company delivers or authorizes delivery of the segments for promotional purposes and neither the Service ProviderService nor the Sound Recording Company creates or uses a segment of a sound recording in violation of 17 U.S.C. 106(2) or 115(a)(2);

(4) the Promotional Offering is made available to an End User free of any charge; and

(5) the Service ProviderService provides to the End User at the same time as the Promotional Offering stream an opportunity to purchase the sound recording or the Service ProviderService periodically offers End Users the opportunity to subscribe to a paid Offering of the Service ProviderService.

Purchased Content Locker Service means a Locker Service made available to End User purchasers of Permanent Digital Downloads, Ringtones, or physical phonorecords at no incremental charge above the otherwise applicable purchase price of the PDDsPermanent Downloads, Ringtones, or physical phonorecords acquired from a qualifying seller. With a Purchased Content Locker Service, an End User may receive one or more additional phonorecords of the purchased sound recordings of musical works in the form of Permanent Digital Downloads or Ringtones at the time of purchase, or subsequently have digital access to the purchased sound recordings of musical works in the form of Eligible Interactive Streams, additional Permanent Digital Downloads, Restricted Downloads, or Ringtones.

A qualifying seller for purposes of this definition is the entity operating the Service ProviderService, including affiliates, predecessors, or successors in interest, or—

(1) In the case of Permanent Digital Downloads or Ringtones, a seller having a legitimate connection to the locker service provider pursuant to one or more written agreements (including that the Purchased Content Locker Service and Permanent Digital Downloads or Ringtones are offered through the same third party); or

(2) In the case of physical phonorecords,

(A) The seller of the physical phonorecord has an agreement with the Purchased Content Locker Service provider establishing an integrated offer that creates a consumer experience commensurate with having the same Service ProviderService both sell the physical phonorecord and offer the integrated locker service; or

(B) The Service ProviderService has an agreement with the entity offering the Purchased Content Locker Service establishing an integrated offer that creates a consumer experience commensurate with having the same Service

ProviderService both sell the physical phonorecord and offer the integrated locker service.

~~Record Company means a person or entity that~~

~~(1) Is a copyright owner of a sound recording embodying a musical work;~~

~~(2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under the common law or statutes of any State, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;~~

~~(3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or~~

~~(4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the Copyright Owner of the sound recording.~~

Relevant Page means an electronic display (for example, a Web page or screen) from which a Service ProviderService's Offering consisting of Streams or Eligible Limited Downloads is directly available to End Users, but only when the Offering and content directly relating to the Offering (e.g., an image of the artist, information about the artist or album, reviews, credits, and music player controls) comprises 75% or more of the space on that display, excluding any space occupied by advertising. An Offering is directly available to End Users from a page if End Users can receive sound recordings of musical works (in most cases this will be the page on which the Eligible Limited Download or Eligible Interactive Stream takes place).

Restricted download means a Digital Phonorecord Delivery in a form that cannot be retained and replayed on a permanent basis. The term Restricted Download includes an Eligible Limited Download.

Ringtone means a phonorecord of a part of a musical work distributed as a Digital Phonorecord Delivery in a format to be made resident on a telecommunications device for use to announce the reception of an incoming telephone call or other communication or message or to alert the receiver to the fact that there is a communication or message.

Service Provider means that entity governed by subparts C and D of this part 385, which might or might not be the Licensee, that with respect to the section 115 license

(1) Contracts with or has a direct relationship with End Users or otherwise controls the content made available to End Users;

(2) Is able to report fully on Service Provider Revenue from the provision of musical works embodied in phonorecords to the public, and to the extent applicable, verify Service Provider Revenue through an audit; and

(3) Is able to report fully on its usage of musical works, or procure such reporting and, to the extent applicable, verify usage through an audit.

Service Provider Revenue. (1) Subject to paragraphs (2) through (5) of this definition and subject to GAAP, Service Provider Revenue shall mean:

(i) All revenue from End Users recognized by a Service Provider for the provision of any Offering;

(ii) All revenue recognized by a Service Provider by way of sponsorship and commissions as a result of the inclusion of third-party “in-stream” or “in-download” advertising as part of any Offering, i.e., advertising placed immediately at the start or end of, or during the actual delivery of, a musical work, by way of Eligible Interactive Streaming or Eligible Limited Downloads; and

(iii) All revenue recognized by the Service Provider, including by way of sponsorship and commissions, as a result of the placement of third-party advertising on a Relevant Page of the Service Provider or on any page that directly follows a Relevant Page leading up to and including the Eligible Limited Download or Eligible Interactive Stream of a musical work; provided that, in case more than one Offering is available to End Users from a Relevant Page, any advertising revenue shall be allocated between or among the Service Providers on the basis of the relative amounts of the page they occupy.

(2) Service Provider Revenue shall:

(A) include revenue recognized by the Service Provider, or by any associate, affiliate, agent, or representative of the Service Provider in lieu of its being recognized by the Service Provider; and

(B) include the value of any barter or other nonmonetary consideration; and

(C) except as expressly detailed in this part 385, not be subject to any other deduction or set-off other than refunds to End Users for Offerings that the End Users were unable to use because of technical faults in the Offering or other bona fide refunds or credits issued to End Users in the ordinary course of business.

(3) Service Provider Revenue shall exclude revenue derived by the Service Provider solely in connection with activities other than Offering(s), whereas advertising or sponsorship revenue derived in connection with any Offering(s) shall be treated as provided in paragraphs (2) and (4) of this definition of Service Provider Revenue.

(4) For purposes of paragraph (1) of this definition of Service Provider Revenue, advertising or sponsorship revenue shall be reduced by the actual cost of obtaining that revenue, not to exceed 15%.

(5) In instances in which a Service Provider provides an Offering to End Users as part of the same transaction with one or more other products or services that are not Licensed Activities, then the revenue from End Users deemed to be recognized by the Service Provider for the Offering for the purpose of paragraph (1) of this definition of Service Provider Revenue shall be the lesser of the revenue recognized from End Users for the bundle and the aggregate standalone published prices for End Users for each of the component(s) of the bundle that are Licensed Activities; provided that, if there is no standalone published price for a component of the bundle, then the Service Provider shall use the average standalone published price for End Users for the most closely comparable product or service in the U.S. or, if more than one comparable exists, the average of standalone prices for comparables.

Sound Recording Company means a person or entity that

(1) Is a copyright owner of a sound recording embodying a musical work;

(2) In the case of a sound recording of a musical work fixed before February 15, 1972, has rights to the sound recording, under the common law or statutes of any State chapter 14 of title 17, United States Code, that are equivalent to the rights of a copyright owner of a sound recording of a musical work under title 17, United States Code;

(3) Is an exclusive Licensee of the rights to reproduce and distribute a sound recording of a musical work; or

(4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of the Copyright Owner of the sound recording.

Stream, for the purposes of this part 385, means the digital transmission of a sound recording of a musical work to an End User—

(1) To allow the End User to listen to the sound recording, while maintaining a live network connection to the transmitting service, substantially at the time of transmission, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction;

(2) Using technology that is designed such that the sound recording does not remain accessible for future listening, except to the extent that the sound recording remains accessible for future listening from a Streaming Cache Reproduction; and

(3) That is subject to licensing as a public performance of the musical work.

Streaming Cache Reproduction means a reproduction of a sound recording embodying a musical work made on a computer or other receiving device by a Service Provider Service solely for the purpose of permitting an End User who has previously received a Stream of that sound recording to play the sound recording again from local storage on the computer or other device rather than by means of a transmission; provided that the End User is only able to do so while

maintaining a live network connection to the Service Provider Service, and the reproduction is encrypted or otherwise protected consistent with prevailing industry standards to prevent it from being played in any other manner or on any device other than the computer or other device on which it was originally made.

Student Plan means a discounted Subscription to an Offering available on a limited basis to students.

Subscription means an Offering for which End Users are required to pay a fee to have access to the Offering for defined subscription periods of 3 years or less (in contrast to, for example, a service where the basic charge to users is a payment per download or per play), whether the End User makes payment for access to the Offering on a standalone basis or as part of a Bundle with one or more other products or services.

Total Cost of Content or *TCC* means the total amount expended by a Service Provider Service or any of its affiliates in accordance with GAAP for rights to make Eligible Interactive Streams or Eligible Limited Downloads of a musical work embodied in a sound recording through the Service Provider Service for the accounting period, which amount shall equal the applicable consideration for those rights at the time the applicable consideration is properly recognized as an expense under GAAP. As used in this definition, “applicable consideration” means anything of value given for the identified rights to undertake the Licensed Activity, including, without limitation, ownership equity, monetary advances, barter or any other monetary and/or nonmonetary consideration, whether that consideration is conveyed via a single agreement, multiple agreements and/or agreements that do not themselves authorize the Licensed Activity but nevertheless provide consideration for the identified rights to undertake the Licensed Activity, and including any value given to an affiliate of a Sound Recording Company for the rights to undertake the Licensed Activity. Value given to a Copyright Owner of musical works that is controlling, controlled by, or under common control with a Sound Recording Company for rights to undertake the Licensed Activity shall not be considered value given to the Sound Recording Company. Notwithstanding the foregoing, applicable consideration shall not include in-kind promotional consideration given to a Sound Recording Company (or affiliate thereof) that is used to promote the sale or paid use of sound recordings embodying musical works or the paid use of music services through which sound recordings embodying musical works are available where the in-kind promotional consideration is given in connection with a use that qualifies for licensing under 17 U.S.C. 115.

§385.3 Late payments.

A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment owed to a Copyright Owner and remaining unpaid after the due date established in 17 U.S.C. 115(c)(~~25~~)(1) and detailed in part 210 of this title 37, or any amendments to or replacements of that part. Late fees shall accrue from the due date until the Copyright Owner receives payment.

§385.4 Recordkeeping for promotional and non royalty-bearing uses.

(a) *General.* A Licensee transmitting a sound recording embodying a musical work subject to section 115 and subparts C and D of this part 385 and claiming a Promotional or Free Trial zero royalty rate shall keep complete and accurate contemporaneous written records of making or authorizing Eligible Interactive Streams or Eligible Limited Downloads, including the sound recordings and musical works involved, the artists, the release dates of the sound recordings, a brief statement of the promotional activities authorized, the identity of the Offering or Offerings for which the zero-rate is authorized (including the Internet address if applicable), and the beginning and end date of each zero rate Offering.

(b) *Retention of Records.* A Service Provider Service claiming zero rates shall maintain the records required by this section 385.4 for no less time than the Service Provider Service maintains records of royalty-bearing uses involving the same types of Offerings in the ordinary course of business, but in no event for fewer than five years from the conclusion of the zero rate Offerings to which they pertain.

(c) *Availability of Records.* If a Copyright Owner or agent requests information concerning zero rate Offerings, the Licensee shall respond to the request within an agreed, reasonable time.

Subpart B – Physical Phonorecord Deliveries, Permanent ~~Digital~~ Downloads, Ringtones, and Music Bundles.

§385.10 Scope.

This subpart establishes rates and terms of royalty payments for making and distributing phonorecords, including by means of Digital Phonorecord Deliveries, in accordance with the provisions of 17 U.S.C. 115.

§385.11 Royalty rates.

(a) *Physical phonorecord deliveries and Permanent ~~Digital~~ Downloads.* For every physical phonorecord and Permanent Digital Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download~~PDD~~ shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

(b) *Ringtones.* For every Ringtone the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied therein shall be 24 cents.

(c) *Music bundles.* For a Music Bundle, the royalty rate for each element of the Music Bundle shall be the rate required under paragraph (a) or paragraph (b), as appropriate.

Subpart C—Eligible Interactive Streaming, Eligible Limited Downloads, Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Locker Services, and Other Delivery Configurations

§385.20 Scope.

This subpart establishes rates and terms of royalty payments for Eligible Interactive Streams and Eligible Limited Downloads of musical works, and other reproductions or distributions of musical works through Limited Offerings, Mixed Service Bundles, Bundled Subscription Offerings, Paid Locker Services, and Purchased Content Locker Services provided through subscription and nonsubscription digital music Service Providers~~Services~~ in accordance with the provisions of 17 U.S.C. 115, exclusive of Offerings subject to subpart D.

§385.21 Royalty Rates and Calculations

(a) *Applicable royalty.* Licensees that engage in Licensed Activity covered by this subpart pursuant to 17 U.S.C. 115 shall pay royalties therefor that are calculated as provided in this section, subject to the royalty floors for specific types of services described in §385.22.

(b) *Rate calculation.* Royalty payments for Licensed Activity in this subpart shall be calculated as provided in paragraph (b) of this section. If a Service Provider~~Service~~ includes different Offerings, royalties must be calculated separately with respect to each Offering taking into consideration Service Provider~~Service~~ Revenue and expenses associated with each Offering.

(1) *Step 1:* Calculate the All-In Royalty for the Offering. For each Accounting Period, the all-in royalty shall be the greater of the applicable percent of Service Provider~~Service~~ Revenue and the applicable percent of TCC set forth in the following table.

2018-2022 All-In Royalty Rates					
Royalty Year:	2018	2019	2020	2021	2022
Percent of Revenue	11.4%	12.3%	13.3%	14.2%	15.1%
Percent of TCC	22.0%	23.1%	24.1%	25.2%	26.2%

(2) *Step 2:* Subtract Applicable Performance Royalties. From the amount determined in step 1 in paragraph (b)(1) of this section, for each Offering of the Service Provider~~Service~~, subtract the total amount of Performance Royalty that the Service Provider~~Service~~ has expensed or will expense pursuant to public performance licenses in connection with uses of musical works through that Offering during the Accounting Period that constitute Licensed Activity. Although this amount may be the total of the Service Provider~~Service~~'s payments for that Offering for the Accounting Period, it will be less than the total of the Performance Royalties if the Service Provider~~Service~~ is also engaging in public performance of musical works that does not constitute Licensed Activity. In the case in which the Service Provider~~Service~~ is also engaging in the public performance of musical works that does not constitute Licensed Activity, the amount to be subtracted for Performance Royalties shall be the amount allocable to Licensed Activity uses through the relevant Offering as determined in relation to all uses of musical works for which the Service Provider~~Service~~ pays Performance Royalties for the Accounting Period. The Service Provider~~Service~~ shall make this allocation on the basis of Plays of musical works or,

where per-play information is unavailable because of bona fide technical limitations as described in step 3 in paragraph (b)(3) of this section, using the same alternative methodology as provided in step 4.

(3) *Step 3: Determine the Payable Royalty Pool.* The payable royalty pool is the amount payable for the reproduction and distribution of all musical works used by the Service ProviderService by virtue of its Licensed Activity for a particular Offering during the Accounting Period. This amount is the greater of

- (i) The result determined in step 2 in paragraph (b)(2) of this section, and
- (ii) The royalty floor (if any) resulting from the calculations described in §385.22.

(4) *Step 4: Calculate the Per-Work Royalty Allocation.* This is the amount payable for the reproduction and distribution of each musical work used by the Service by virtue of its Licensed Activity through a particular Offering during the Accounting Period. To determine this amount, ~~the ProviderService must allocate~~ the result determined in step 3 in paragraph (b)(3) of this section must be allocated to each musical work used through the Offering. The allocation shall be accomplished by dividing the payable royalty pool determined in step 3 for the Offering by the total number of Plays of all musical works through the Offering during the Accounting Period (other than Plays subject to subpart D of this part 385) to yield a per-Play allocation, and multiplying that result by the number of Plays of each musical work (other than Plays subject to subpart D of this part 385)) through the Offering during the Accounting Period. For purposes of determining the per-work royalty allocation in all calculations under this step 4 only (*i.e.*, after the payable royalty pool has been determined), for sound recordings of musical works with a playing time of over 5 minutes, each Play shall be counted as provided in paragraph (c) of this section. Notwithstanding the foregoing, if the Service ProviderService is not capable of tracking Play information because of bona fide limitations of the available technology for Offerings of that nature or of devices useable with the Offering, the per-work royalty allocation may instead be accomplished in a manner consistent with the methodology used by the ProviderService for making royalty payment allocations for the use of individual sound recordings.

(c) *Overtime adjustment.* For purposes of the calculations in step 4 in paragraph (b)(4) of this section only, for sound recordings of musical works with a playing time of over 5 minutes, adjust the number of Plays as follows.

- (1) 5:01 to 6:00 minutes—Each play = 1.2 plays
- (2) 6:01 to 7:00 minutes—Each play = 1.4 plays
- (3) 7:01 to 8:00 minutes—Each play = 1.6 plays
- (4) 8:01 to 9:00 minutes—Each play = 1.8 plays
- (5) 9:01 to 10:00 minutes—Each play = 2.0 plays
- (6) For playing times of greater than 10 minutes, continue to add 0.2 plays for each additional minute or fraction thereof.

(d) *Accounting.* The calculations required by paragraph (b) of this section shall be made in good faith and on the basis of the best knowledge, information, and belief ~~of the Licensee~~ at the time payment is due, and subject to the additional accounting and certification requirements of 17 U.S.C. 115(c)(~~25~~)(I), 17 U.S.C. 115(d)(4)(A)(i) and part 210 of this title. Without limitation, ~~a Licensee's~~ statements of account shall set forth each step of ~~the~~its calculations with

sufficient information to allow the ~~Copyright Owner to assess~~ment of the accuracy and manner in which ~~the Licensee determined~~ the payable royalty pool and per-play allocations (including information sufficient to demonstrate whether and how a royalty floor pursuant to §385.22 does or does not apply) were determined and, for each Offering ~~the Licensee reported~~s, also indicate the type of Licensed Activity involved and the number of Plays of each musical work (including an indication of any overtime adjustment applied) that is the basis of the per-work royalty allocation being paid.

§ 385.22 Royalty Floors for Specific Types of Offerings.

(a) *In general.* The following royalty floors for use in step 3 of §385.21(b)(3)(ii) shall apply to the respective types of Offerings.

(1) *Standalone non-portable Subscription—streaming only.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings only in the form of Eligible Interactive Streams and only from a non-portable device to which those Streams are originally transmitted while the device has a live network connection, the royalty floor is the aggregate amount of 15 cents per subscriber per month.

(2) *Standalone non-portable Subscription—mixed.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings either in the form of Eligible Interactive Streams or Eligible Limited Downloads but only from a non-portable device to which those Streams or Eligible Limited Downloads are originally transmitted, the royalty floor for use in step 3 of §385.21(b)(3)(ii) is the aggregate amount of 30 cents per subscriber per month.

(3) *Standalone portable Subscription Offering.* Except as provided in paragraph (a)(4) of this section, in the case of a Subscription Offering through which an End User can listen to sound recordings in the form of Eligible Interactive Streams or Eligible Limited Downloads from a portable device, the royalty floor for use in step 3 of §385.12(b)(3)(ii) is the aggregate amount of 50 cents per subscriber per month.

(4) *Bundled Subscription Offerings.* In the case of a Bundled Subscription Offering, the royalty floor for use in step 3 of §385.21(b)(3)(ii) is the [aggregate amount of 25 cents per month][the royalty floor that would apply to the music component of the bundle if it were offered on a standalone basis] for each End User who has made at least one Play of a licensed work during that month (each such End User to be considered an “active subscriber”).

(b) *Computation of royalty rates.* For purposes of paragraph (a) of this section, to determine the royalty floor, as applicable to any particular Offering, the total number of subscriber-months for the Accounting Period, shall be calculated by taking all End Users who were subscribers for complete calendar months, prorating in the case of End Users who were subscribers for only part of a calendar month, and deducting on a prorated basis for End Users covered by an Offering subject to Subpart D, except in the case of a Bundled Subscription Offering, subscriber-months shall be determined with respect to active subscribers as defined in

paragraph (a)(4) of this section. The product of the total number of subscriber-months for the Accounting Period and the specified number of cents per subscriber (or active subscriber, as the case may be) shall be used as the subscriber-based component of the royalty floor for the Accounting Period. A Family Plan shall be treated as 1.5 subscribers per month, prorated in the case of a Family Plan Subscription in effect for only part of a calendar month. A Student Plan shall be treated as 0.50 subscribers per month, prorated in the case of a Student Plan End User who subscribed for only part of a calendar month.

Subpart D – Promotional and Free-to-the-User Offerings

§385.30 Scope.

This subpart establishes rates and terms of royalty payments for Promotional Offerings, Free Trial Offerings, and Certain Purchased Content Locker Services provided by subscription and nonsubscription digital music Service Providers~~Services~~ in accordance with the provisions of 17 U.S.C. 115.

§385.31 Royalty Rates.

(a) *Promotional Offerings.* For Promotional Offerings of audio-only Eligible Interactive Streaming and Eligible Limited Downloads of sound recordings embodying musical works that the Sound Recording Company authorizes royalty-free to the Service Provider~~Service~~, the royalty rate is zero.

(b) *Free Trial Offerings.* For Free Trial Offerings for which the Service Provider~~Service~~ receives no monetary consideration, the royalty rate is zero.

(c) *Certain Purchased Content Locker Services.* For every Purchased Content Locker Service for which the Service Provider~~Service~~ receives no monetary consideration, the royalty rate is zero.

(d) *Unauthorized use.* If a Copyright Owner or agent of the Copyright Owner sends written notice to a Licensee stating in good faith that a particular Offering subject to this subpart D differs in a material manner from the terms governing that Offering, the Licensee must within 5 business days cease Streaming or otherwise making available that Copyright Owner's musical works and shall withdraw from the identified Offering any End User's access to the subject musical work.